BEFORE THE

Federal Communications Commission

WASHINGTON, D.C.

In the Matter of	)	
	)	
Amendment of the Commission's Rules	)	WT Docket 96-6
to Permit Flexible Service Offerings	)	
in the Commercial Mobile Radio Services	)	

REPLY COMMENTS OF THE
CELLULAR TELECOMMUNICATIONS INDUSTRY ASSOCIATION

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The Cellular Telecommunications Industry Association ("CTIA")[1], hereby submits its Reply Comments in the above-captioned proceeding.[2]

I. INTRODUCTION AND SUMMARY

The Commission's decision in the First Report and Order to liberalize the use of CMRS spectrum to include the provision of fixed services is a necessary step to promote the development of CMRS, but it alone is not a sufficient step. So long as CMRS provision of fixed services is regulated outside the CMRS model

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[1] CTIA is the international organization of the wireless communications industry for both wireless carriers and manufacturers. Membership in the association covers all Commercial Mobile Radio Service ("CMRS") providers, including 48 of the 50 largest cellular, broadband personal communications service ("PCS"), enhanced specialized mobile radio, and mobile satellite service providers. CTIA represents more broadband PCS carriers, and more cellular carriers, than any other trade association.

[2] Amendment of the Commission's Rules to Permit Flexible Service Offerings in the Commercial Mobile Radio Services, First Report and Order and Further Notice of Proposed Rulemaking in WT Docket 96-6, FCC 96-283 (released August 1, 1996) ("First Report and Order" or "Further Notice").

established in Section 332,[3] the creation and development of new fixed services will not be fully realized. For this reason, CTIA expressed concern when the Commission issued the Further Notice rather than decide the regulatory status of CMRS fixed services based on the record before it. As CTIA observed in its comments, the fact that the Further Notice gave no policy justification for regulating CMRS outside the Section 332 regulatory model, coupled with the definitional issues raised in the Further Notice, suggests that the Commission is concerned that it lacks the requisite authority to regulate fixed services offered by CMRS providers under Section 332. Fortunately, the record developed in response to the Further Notice provides no basis for such a concern; indeed, the record indicates that the Commission in fact possesses the authority it seeks.

CTIA demonstrated in its initial comments that Congress granted the Commission sufficient latitude to define "mobile services" such that the Commission may include the provision of fixed services[4] and that sound policy supports such a result.[5]

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[3] 47 U.S.C. § 332.

[4] See CTIA Comments at 4-10. In brief, we explained that Congress granted the Commission express authority to classify which services should be considered "personal communications services," as well as to establish alternative definitions of "mobile services" in successor proceedings. See 47 U.S.C. § 153(27). Moreover, Congress in its deliberations specifically contemplated that "mobile services" may comprehend fixed applications as well.

[5] When amending Section 332 in 1993, Congress specifically recognized, and approved of, wireless carriers providing "basic telephone service" in competition with wireline carriers. CTIA Comments at 10-13. Moreover, the broad public

While many commenters echo this analysis, several local exchange carriers ("LECs"), public utility commission's ("PUCs") and related associations argue that:

- notions of regulatory parity require regulation of fixed services offered by CMRS providers just as wireline LECs are regulated; and

- Section 332 does not preempt state regulation of fixed services.

These arguments lack merit and should be rejected. First, the concept of "regulatory parity" does not provide a policy basis for regulating CMRS fixed services under the full panoply of Title II regulation applicable to wireline LECs because asymmetrical regulation is appropriate where service providers are not similarly situated. In enacting legislation designed to reform the CMRS market in 1993, and more recently with the passage of the Telecommunications Act of 1996 ("1996 Act"), Congress recognized that the presence of competition, and the corresponding absence of substantial, persistent market power, is the determining factor in setting the appropriate level of regulatory oversight. Firms are inherently not "similarly-situated" if they possess differing levels of market power; therefore, disparate regulatory treatment applied to monopoly and competitive firms is fully justified, as necessary to protect the public interest. Second, the Commission has the requisite

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interest benefits resulting from permitting use of CMRS spectrum for fixed services will be sacrificed if such services are subjected to burdensome, unnecessary regulation.

authority under both Section 332 and Section 253,[6] as added by 1996 Act, to preempt state regulation of fixed services offered by CMRS providers.

II. REGULATORY PARITY DOES NOT PROVIDE A POLICY OR LEGAL BASIS FOR REGULATING CMRS PROVIDERS OUTSIDE OF SECTION 332.

NTCA, and the Public Utility Commission of Ohio ("PUCO") urge the Commission to regulate CMRS provision of fixed services in a manner consistent with the Commission's regulation of wireline local exchange service.[7] Specifically, NTCA argues that "[i]nstead of tilting the balance toward one type of fixed service, the FCC should take steps to ensure that providers of local exchange access are regulated in a manner that does not favor one type of technology or group of competitors over another."[8] Similarly, PUCO argues that regulating fixed local wireless services as CMRS "would have the effect of favoring fixed wireless loop services in the establishment of a competitive local market," and "could result in inconsistent policies for the provision of similar services by different types of local carriers."[9] Several LEC commenters proffer a variant of the regulatory parity argument, suggesting that fixed services offered by CMRS providers be regulated in the same manner as

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6 47 U.S.C. § 253(a) (removal of state entry barriers).

7 NTCA Comments at 3; PUCO Comments at 4.

8 NTCA Comments at 3-4.

9 PUCO Comments at 4.

wireline LECs when the CMRS provider offers a service that could substitute for wireline service.[10]

These arguments lack merit. As a practical matter, the outcome advocated by these commenters doubtlessly would increase the level of regulation for CMRS providers, but with no tangible benefit to competition or to consumers.[11] When CMRS carriers begin providing local loop services, they will be introducing competition into the local exchange market. But the associated "reward" for such action, as proffered by these commenters, would be increased regulation by both Federal and State regulators, so that "regulatory parity" would be preserved. From a policy perspective, this result is suboptimal and should be avoided.

If the Commission truly intends to adopt policies which favor competition and not competitors, it should give CMRS providers incentives, by its regulations, to enter the local exchange market and to compete vigorously. To the extent that disparity is created between CMRS providers and other competitive LECs, the Commission should exercise its forbearance and other authority under the Communications Act to "level the playing field" correspondingly, i.e., remove for all competitive carriers unnecessary regulatory constraints. This outcome would be both

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[10] Bell Atlantic/NYNEX Comments at 3, n. 7; BellSouth Comments at 2-3; Pactel Comments at 2-3; GTE Comments at 3.

[11] See Robert H. Bork, The Antitrust Paradox: A Policy at War With Itself, 347 (1978) ("Predation by abuse of governmental procedures, including administrative and judicial processes, presents an increasingly dangerous threat to competition").

desirable and natural, as it would tie reductions of regulatory scrutiny with the development of competition, consistent with Congressional intent.

Moreover, as CTIA has demonstrated previously in this proceeding, the concept of regulatory parity is simply inapplicable to wireless local telephone services offered by a CMRS provider and the wireline services offered by an incumbent LEC. Historically, incumbent wireline LECs have possessed market power in the provision of local telephone services, while CMRS providers have not. Simply put, the co-existence of competitive firms and those with entrenched market power in the telecommunications industry requires differential regulation. The marketplace will not benefit from regulatory policies which artificially encumber some participants with needless regulation. In essence, the state regulatory authorities seek to apply the old regulatory model to nascent competition, rather than allowing the development of competition in the provision of local telephone service to erode the underlying justification for government regulation -- market power. This kind of least-common-denominator regulation, in which forbearance is granted only when the entire market is sufficiently competitive, will not serve the ultimate goal of competition and consumer welfare. Rather, the appropriate regulatory approach is to identify and then expeditiously remove unnecessary restrictions for all providers lacking market power. This is precisely the approach Congress took in 1993 when it modified Section 332.

In amending Section 332 in 1993, Congress established "uniform rules" to govern all commercial mobile service offerings "to ensure that all carriers providing such services are treated as common carriers under the Communications Act of 1934."[12] It specifically determined, however, that it was only necessary to preserve the "key principles" of common carriage such as "nondiscrimination" and to permit "minimal state regulation."[13] Congress gave the Commission "authority to specify by rule which provisions of title II may not apply," and it preempted state rate and entry regulation of CMRS to "foster the growth and development of mobile services that, by their nature, operate without regard to state lines as an integral part of the national telecommunications infrastructure." [14]

Thus, Congress explicitly recognized that the Commission's prior regulatory efforts (in the absence of statutory reform) to address the increasing competitive nature of mobile services by labeling emerging mobile services carriers as "private" was creating harmful disparity. In fact, under the law existing at that time, Congress found that private carriers were

> permitted to offer what are essentially common carrier services . . . while retaining private carrier status. Functionally, these 'private' carriers [became]

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12 H.R. Rep. No. 111, 103rd Cong., 1st Sess. 259 (1993) ("House Report"). See also H.R. Conf. Rep. No. 213, 103rd Cong., 1st Sess. 490 (1993) (the intent of Section 332(c)(1)(A) "is to establish a Federal regulatory framework to govern the offering of all commercial mobile services"). ("Conference Report").

13 See 139 Cong. Rec. H3287 (daily ed. May 27, 1993) (statement of Rep. Markey).

14 House Report at 260.

> indistinguishable from common carriers but private land mobile carriers and common carriers [were] subject to inconsistent regulatory schemes [i.e., common carriers were subject to Title II plus state regulation and private carriers were subject to essentially no regulation].[15]

In direct response to this inherent and unintended disparity, Congress revised Section 332 to permit federal forbearance and to require state preemption so that "the disparities in the current regulatory scheme [do not] impede the continued growth and development of commercial mobile services and deny consumers the protections they need."[16]

Of course, the very disparities referred to by Congress were ones in which providers of substantially similar services, who were also similarly situated (i.e., lacking substantial market power) were subject to differing regulatory regimes. In specific recognition and affirmation of the Commission's previous (and necessarily piecemeal) efforts to remove these burdens, Congress introduced regulatory reform into the CMRS market to make explicit the Commission's implicit intentions.

Indeed, Congress specifically authorized and required disparate federal and state regulatory treatment of wireless vis-à-vis wireline local exchange service. This is the very reason why it permitted the Commission to forbear from all but Sections 201, 202 and 208 of Title II for CMRS, and the very reason why it preempted state rate and entry regulation, even in those cases

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15 House Report at 259-260 (citation omitted).

16 Id. at 260.

where the CMRS carrier was providing functionally equivalent local exchange services in competition with the wireline incumbent.

Specifically, in commenting on the states' residual authority to regulate CMRS providers for universal service concerns, Congress noted that

> [n]othing in this subparagraph shall exempt providers of commercial mobile services (where such services are a substitute for land line telephone exchange service for a substantial portion of the communications within such State) from requirements imposed by a State commission on all providers of telecommunications services necessary to ensure the universal availability of telecommunications service at affordable rates.[17]

As the Conference Report clarifies:

> the Conferees intend that the Commission should permit States to regulate radio service provided for basic telephone service <u>if subscribers have no alternative means of obtaining basic telephone service</u>. If, however, several companies offer radio service <u>as a means of providing basic telephone service</u> in competition with each other, such that consumers can choose among alternative providers of this service, <u>it is not the intention of the conferees that States should be permitted to regulate these competitive services simply because they employ radio as a transmission means</u>.[18]

Therefore, it is clear that Congress believed that the underlying market power of the respective parties, and not whether the services they provided were competitive. Moreover, Congress deliberately and severely limited the application of state authority in regulating CMRS provision of basic telephone

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17 47 U.S.C. § 332(c)(3)(A).

18 Conference Report at 493 (emphasis added).

service. In fact, Congress reserved the states' authority to regulate the rates charged by CMRS for basic telephone service only if the wireless carrier were the sole local exchange services provider in the relevant geographic market. Importantly, if there were more than one provider of basic telephone service, state rate regulation of the CMRS provider was not permitted at all. Thus, LEC comments in this proceeding suggesting that regulatory parity is required when CMRS providers offer fixed services that could "substitute" for LEC wireline service are mistaken. Under Section 332, state rate regulation of CMRS providers is only implicated when the CMRS provider offers the only local exchange service available -- in other words, when the CMRS provider has market power resulting from a monopoly.

In the 1996 Act, Congress continued and expanded upon its emphasis on tailoring regulatory burdens to differing degrees of market power. Specifically, the interconnection and unbundling provisions of Section 251[19] recognize three distinct levels of obligations or duties to be imposed upon various telecommunications providers, entirely dependent upon their level of market power.

The general duties to interconnect (either directly or indirectly) with other telecommunications carriers and to maintain a minimum level of network compatibility[20] applies to

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19 47 U.S.C. § 251.

20 47 U.S.C. § 251(a).

almost all providers of telecommunications services, including LECs, incumbent LECs and CMRS providers.[21] In turn, local exchange carriers, a category from which CMRS providers are specifically excluded, have the additional obligations to provide resale, number portability, dialing parity, access to rights-of-way and reciprocal termination.[22] Finally, incumbent local exchange carriers have additional obligations to provide, among other things, direct interconnection, unbundled access, resale at wholesale rates, and physical collocation.

It is no accident that the duties and obligations imposed upon all carriers in the interconnection provision increase with their level of market power. Congress specifically passed the 1996 Act as a means to "provide for a pro-competitive, de-regulatory national policy framework designed to accelerate rapidly private sector deployment of advanced telecommunications and information technologies and services to all Americans by opening all telecommunications markets to competition."[23] It recognized that some markets, and some carriers in those markets,

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[21] 47 U.S.C. § 153(44) (expansive definition of telecommunications carrier).

[22] 47 U.S.C. § 251(b)(1)-(5). The 1996 Act defines a local exchange carrier as "any person that is engaged in the provision of telephone exchange service or exchange access. Such term does not include a person insofar as such person is engaged in the provision of a commercial mobile service under section 332(c), except to the extent that the Commission finds that such service should be included in the definition of such term." 47 U.S.C. § 153(26).

[23] S. Conf. Rep. No. 230, 104th Cong., 2d Sess, at 1 (1996).

would need closer regulatory supervision as the transition to workable competition was made. Therefore, Congress intentionally created a system of differential regulation based upon the ability to exercise market power. Thus, a Commission decision to regulate CMRS fixed services under Section 332 process is entirely consistent with Congressional intent, as evidenced in the 1996 Act.

III. CONTRARY TO ARGUMENTS RAISED BY NARUC, SECTION 332 PREEMPTS STATE REGULATION OF CMRS FIXED SERVICES IF SUCH SERVICES ARE FOUND TO BE CMRS.

CTIA demonstrated in its comments in response to the Further Notice that the definition of "mobile service" under the Communications Act is sufficiently flexible to include fixed services in its ambit.[24] CTIA also demonstrated that sound policy supports such a result.[25] However, in its comments NARUC argues that "[f]ixed services. . . are controlled solely by section 152(b)."[26] NARUC premises this argument on the fact that Section 332 refers to mobile services, but does not refer to fixed services.[27] This argument misses the mark and should be rejected. As described above and in CTIA comments in response to the Further Notice, the central threshold question raised by the Commission in the Further Notice is whether fixed services are included in the definition of mobile services as set forth in the

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24 CTIA Comments at 4-10.

25 Id. at 10-16.

26 NARUC Comments at 5.

27 Id.

Communications Act. In essence, NARUC acknowledges that, in most cases, Section 332 preempts state regulation of rates for "mobile service."[28] NARUC's error is that it fails to provide any argument that the Commission lacks authority to find that fixed services are included in Congress' definition of "mobile service."[29] CTIA demonstrated in its comments that the Commission possesses such authority, and that its authority should be exercised here.[30]

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[28] The common carrier provisions of Title II of the Act generally reflect a dual regulatory scheme with respect to telecommunications services (i.e., the Commission retains jurisdiction over interstate matters while intrastate regulation resides with the states). Specifically, Section 151, grants the Commission jurisdiction over interstate telecommunications matters. The Communications Act specifically reserves to the states "jurisdiction with respect to . . . charges, classifications, practices, services, facilities [and] regulations for or in connection with intrastate communication service." 47 U.S.C. § 152(b). However, with respect to mobile services, state jurisdiction is explicitly limited by Section 332. See 47 U.S.C. § 332(c)(3)(A) (express preemption of state regulation of entry of and rates charged by CMRS providers).

[29] While the New York Department of Public Service ("NYDPS") argues that fixed services do not fall within the definition of mobile service in the act (47 U.S.C. § 153(27)), it does so by completely ignoring the second half of the definition and, therefore, is unpersuasive. NYDPS Comments at 2. Similarly, GTE suggests, without explanation, that "some fixed wireless applications may not meet the statutory definition of CMRS." GTE Comments at 3. CTIA has demonstrated that the definition of mobile service is sufficiently flexible to encompass any fixed application. See CTIA Comments at 4-10.

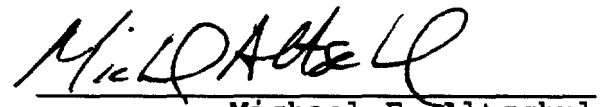
[30] The Commission need not reach the issue of whether it has the authority to preempt state regulation of CMRS fixed services in the absence of Section 332. However, CTIA notes that Section 253(d), adopted as part of the 1996 Act, provides that the Commission may preempt state regulations which constitute entry barriers, and that the Commission was granted the requisite authority to forbear from applying Title II obligations in Section 10 of the Act (47 U.S.C. § 160).

IV. CONCLUSION

CTIA respectfully requests that the Commission recognize and exercise its statutory authority to regulate any fixed service offered using CMRS spectrum under Section 332 of the Act.

Respectfully submitted,

CELLULAR TELECOMMUNICATIONS INDUSTRY ASSOCIATION



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